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SUPREME COURT

OF THE UNITED STATES.

Filed Mar. 20, 1899.

OCTOBER TERM, A. D. 1898.

No. 239.

LINDSAY & PHELPS COMPANY,
Plaintiff-in-error.

vs.

JOHN H. MULLEN AND STATE OF MINNESOTA,
Defendants-in-error.

Brief of Defendants-in-Error.

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Defendants-in-Error.

BRIEF OF DEFENDANT-IN-ERROR.

STATEMENT.

The State of Minnesota is by law divided into five districts for the survey and measurement of logs and timber therein. Of these, the Fourth district, and the one involved in this litigation, is defined as follows:

"The Mississippi river and its tributaries below the out-let of Lake Pepin to the southern line of Wabasha county."

The defendant-in-error, John H. Mullen, was in the early part of the year 1893 duly appointed surveyor-general of logs and lumber of said district. He at once accepted the said office and entered into the discharge of the duties thereof and continued therein throughout the year 1893.

On the West shore of the Mississippi river a boom had been

constructed some years prior to 1893 by the Minnesota Boom Company, a corporation organized under the laws of the said state. During the year 1893 it was in full operation and boomed the very large amount of 500,000,000 feet of logs (Record, p. 58).

The construction of the boom is clearly stated in the testimony of witnesses (Record, 44), and well illustrated by exhibit (Record blue print).

It will be observed that it is so constructed that all logs floating down the river are sheared or turned into it by means of a shear boom extending from the main works diagonally across the river to the Wisconsin shore.

It is in evidence that the great mass of logs floating from above it are loose and that those of different owners are mingled together when received into it. It is the very object of the boom to assort such logs and to properly brail them for rafting.

In order to properly inspect and survey logs, every one must be seen, its marking noted, its character ascertained, and its contents computed.

The defendant-in-error, Mullen, fully advised as to the importance of his official duties in such regard, appointed a large number of deputies and assistants, erected buildings for their accommodation in proximity to the works (Record p. 37), and thereupon began the work of making an inspection and survey of logs and timber running out of the said boom.

But at the very inception of his duties, he was studiously resisted, hampered and annoyed by the agents and employees of the boom company. It is evident from the Record that it was the purpose of the said company to interpose so many obstacles and to so inspect his official work as to cause him in despair to desist therefrom. He was only able to proceed at all with the work by sueing out an injunction order restraining such interference. (Record, p. 37.) The evidence upon this topic largely appears on pages 46 to 49 of the Record. It

will be seen by reference thereto that these obstructions were extremely exasperating. They began by an attempt to prevent the erection of the buildings. The agent in charge of the boom, one Scott, had given orders to a subordinate to cut the ropes of the barge on which lumber for the camps was being moored. (Record, 46.)

> "A. Mr. Scott was on the bank, and he and I had some talk about what happened a couple of days before that. I said I thought Mr. Douglas acted very roughly with me in cutting the barge loose. He said: 'I gave him orders to cut the barge loose.'
>
> "The Witness: The first obstruction was when we undertook to land the barge; a brail of logs was dropped down against the barge. I undertook to make fast to the pile out in the river. A brail of logs came out, and I told a man with a skiff to get on to the brail and pull; they did so and made fast to the piling in the river. Mr. Douglas ran up to the steamer Hartford and ordered them to let that line go, and they did so. I didn't know anything about it, and called out to them to know what was the matter when I saw the line let go. They came in, and I told them to go and make fast to the shore, and not let go unless I told them to. They started with another line, or the other end of that line on shore, and made fast to a tree in the water. I was snubbing the end of the line on the barge when Mr. Douglas, with his steamboat, ran down between me and the shore and got the line fast on the bow of his boat. I threw the line loose on the barge, and let it drop in the water, so that he ran over it. I turned to pull it in again and heard him call to some man in a skiff to cut the line, and the line was cut square off. I called the men in with the skiff again, and told them to take the other line and go ashore—we were then getting near the shore—and Mr. Douglas, with his steamboat, ran round on the lower side of me and said: 'Get out of here.' I told him this was stuff to build camps for Gen. Mullen, and I would

like him to tow me to where I wanted to go. I told him I wanted to go up there, and he said he would tow me down the river. I told him I didn't want to go down the river; I said I wanted to go up the river. He said, 'Get out of here.' I said, 'I have got some stuff that I am going to land to make camps for Gen. Mullen.' He said, 'If you will put a board on shore I will throw it into the river.' He said, 'Come down to the office.' I started to the hind end of the barge, and when I got very near the hind end of the barge he picked up the line and picked up a pole and pushed the barge out in the river. They let it go adrift, and we had nothing to make a landing with.

"Q. What was the condition of the water?

"Objected to as immaterial and incompetent. Objection overruled. Plaintiff excepts.

"A. It was very high; running over the banks of both sides; a very swift current.

"Q. What was next done?

"Objected to as immaterial and incompetent. Objection overruled. Plaintiff excepts.

"Mr. Clapp: It seems to me that is immaterial; we do not deny that we used all reasonable means to prevent them landing, believing they were wrong, and were attempting to land on our private property. *We shall not claim that this defendant did not do his duty as far as scaling the logs was concerned.*

"Q. What was then done?

"Objected to as immaterial and incompetent. Objection overruled. Plaintiff excepts.

"The Witness: We drifted down the river a little way when someone ordered a steamboat to go and hitch on to us and take us off the premises. The steamer John Paul came along and coupled on to the barge and started down the river with us. I asked who was the captain of the boat, and Mr. McKenzie said he was the foreman. I asked him where he was going with me; he said he was going to take us to Minneiska. I told him I didn't want to go to Minne-

iska. I wanted him to take me where I could unload and build a camp. He said he had to ob[illegible] orders. They took us down and landed us as far [illegible]wn as Minneiska and tied a line to the shore, and then went off and left us there. This was between five and six miles below the point where we were cut loose, I should judge."

Record p, 47–8.

It was a bold attempt by a powerful corporation to prevent, in defiance of law, the performance of official duty.

The defendant-in-error, Mullen, prosecuted his work faithfully, by the aid of experienced scalers, and at the close of each month, as required by law, made out and delivered to the agent of the boom companies, a scale bill and demanded the payment of the statutory fee prescribed for such services. The payment of such fees was refused, and he thereupon seized, in accordance with statutory authority, the logs which are now the subject of this litigation. Before the time had arrived when the logs could be lawfully sold, the plaintiff-in-error brought an action in replevin in the Circuit Court for the district of Minnesota and thus reacquired possession of the said property.

The legislature of Minnesota, recognizing the great sacrifices which had been made by the defendant-in-error, Mullen, by his efforts in executing the laws by which his office is governed, provided in 1895, (by the act set forth at length on page 25 of the brief of the plaintiff-in-error, for his relief, among other things), for the payment of $15,800 to him on account of disbursements made and expenses incurred by him in such regard. It was further provided that before the payment of the sum so appropriated should be made, the said Mullen should assign to the state any and all claims which he then had for labor performed and expenses and disbursements incurred by him as such Surveyor General.

The assignment was duly made (Original Record, p. 41)

and thereupon the state became a party to the pending suit (Record, p. 21).

In the court below judgment was rendered for the defendant-in-error.

ARGUMENT.

I.

The booms at West Newton Slough are booms chartered by law within the meaning of the statutes of Minnesota authorizing the inspection of logs.

It has long been the settled policy of the state of Minnesota to require all logs and lumber running out of a chartered boom to be surveyed.

The original act upon the subject was enacted by the territory of Minnesota in 1854 and provided for survey by the officer "when requested to so do."

Laws 1854, chap. 16, sec. 10.

But in 1857 the law was amended by omitting the words just quoted.

Laws 1857 (Extra session,) chap. 28, sec. 1.

The policy of the state in such regard has remained unchanged ever since, the present law, being the one under which the survey was made in 1893, reading as follows:

> "Each surveyor general, by himself or deputy, shall survey all logs and timber running out of any boom now chartered or which may hereafter be chartered by law in his district, and at the end of each month when he has surveyed any such logs or timber, make out and deliver to the owner of such boom, or the managing agent thereof, a true and correct scale bill, stating the date of such survey, the number of logs and pieces of timber, the marks thereon respectively, and the number of feet of each mark so surveyed during the month, and shall sign the same; and he shall immediately record such bill in the books of his office, and upon

being paid his fees for such services, shall deliver the original bill to the owner or managing agent of such boom; and all boomage or fees of such boom on any logs or timber shall be collected in accordance with such survey. And all scale bills heretofore made and signed by any such surveyor general, or the record thereof in the respective offices of such surveyor generals, or copies of such records, duly certified, shall, in all courts of this state, be prima facie evidence of the matters stated in such scale bill, record or copy."

Gen. Stat. Minn., 1894, sec. 2400.

The purpose which has actuated the legislature in enacting and continuing in force that provision of statute is readily understood.

Minnesota contains, as this Court is informed by its judicial knowledge, extensive pine forests which are the source of great lumbering interests. The pine areas are in great measure tributary to rivers and streams which have always been utilized to a very large extent for floating logs to mills and markets. As a single stream is commonly employed during the same season by many persons, firms or corporations for the floatings of logs it is unavoidable that the logs of different owners should become intermingled, giving rise to many vexations and, now and then, to downright rascality.

To minimize such evils, two expedients naturally came into vogue, the one, the adoption of log markings, and the other, a public inspection.

For more than forty years the state has unremittingly required such inspection. No charter has been granted, and no incorporation permitted, for the purpose of booming logs in the rivers and streams of that state, since 1857, which was not attended with the condition that those logs should be subject to public inspection.

The Minnesota Boom Company was incorporated under the General Laws of Minnesota in 1889. The purposes for

which it was organized appeared in article 1 of its articles of association, which is as follows:

> "The general nature of the corporate business shall be the construction, maintenance and use of booms, dams, and all other structures of any kind necessary or advantageous for the performance of the logging and lumbering business hereinafter described, upon the Mississippi river, or either bank thereof, between the mouth of the Chippewa river, or a point opposite thereto, and the points where the easterly boundary line of the city of Winona meets the Mississippi river, or a point opposite thereto, and also upon, or any side or bank of, any slough, bayou, branch or part of the Mississippi river between or connecting with said river at any point between the extreme limits aforesaid. The business of the corporation, beside the construction, maintenance and operation of said structures, shall be gathering, driving, booming, storing, assorting, rafting, brailing and otherwise handling any and all logs, lumber and timber of any kind, between the limits and upon the waters and territory above stated, for any and all persons having any logs, lumber or timber upon any of said waters or within said territory, and this corporation shall have the right to charge and receive, and shall charge and receive, from any and all persons upon or in connection with those logs, lumber or timber, any work or services *are* done by this corporation, a proper sum and compensation by it to be fixed for such work or services, and this corporation shall also do any other business incident to any part of the general business aforesaid. The principal place of business of the corporation shall be the city of Winona, Winona county, Minnesota."
>
> *Record, p 107.*

By reference to its articles, it will be perceived that they contain no specification of the particular statute under which the incorporation was intended to be made. The attempt was

evidently made to so incorporate as to be in position to invoke any favorable provisions of statute as circumstances might require.

At the time when the Minnesota Boom Company was organized there were doubtless only two provisions of statute under which an incorporation could legally be effected. One of these is *Gen. Stat. Minnesota, chap. 34, Tit. 1, sec. 1*, which, so far as material, is as follows:

> "Any number of persons, not less than five, may associate themselves and become incorporated for the purpose of building, improving and operating railways, telegraphs, canals, or slackwater navigation, upon any river or lake, and all works of internal improvement which require the taking of private property or any easement therein."

The other provision is *Gen. Stat. Minnesota, chap. 34, Tit. 2, sec. 1*, which, so far as material, is as follows:

> "Any number of persons, not less than three, who have or shall, by articles of agreement, associate, according to the provisions of this title, under any name assumed by them, for the purpose of engaging in or carrying on the business of mining, * * * or other lawful business."

It is contended by the plaintiff-in-error, page 51 of brief, that at the time when the said company was organized, there was no law which gave it any authority "beyond the mere power to be a corporation," except the said chapter 221. But chapter 221 had not been enacted at the time when the corporation was formed. That chapter was approved and became a law April 24, 1889.

Gen. Laws Minn. 1889, chap. 221.

The company was organized eighteen days before that, namely, April 6, 1889. (*Record p. 109.*)

But counsel have evidently fallen into serious error. The words "or other lawful business," contained in section 1 of title 2, *supra*, have been construed by the Supreme Court of Minnesota, wherein the court say:

> "1. Assuming that defendants were in position to raise these points in this case, we are of opinion that neither of them is well taken. The first point all hinges upon the effect and force to be given to the expression 'or other lawful business,' as used in the statute referred to. Gen. Stat. 1866, chap. 34, sec. 45, as amended by Laws 1873, c. 13. As originally enacted, this statute authorized the formation of corporations for various kinds of business specifically enumerated. To these others were added by an amendment in 1868, and still others in 1869. Finally, in March, 1873, it was again amended so as to include a variety of still other kinds of business specifically enumerated, and then adding the general words 'or other lawful business.' Defendants invoke the rule that when particular words are followed by general ones, the general words are restricted in meaning to objects of the kind particularly enumerated, and therefore that the phrase 'or other lawful business' must be limited to a business of the same kind as those previously enumerated. We think the rule invoked is not applicable, at least in the narrow and restricted sense, in which defendants seek to apply it. The kinds of business specifically enumerated bear no common analogy to each other except that they are all for pecuniary profit, and of a strictly private character as distinguished from those to be carried on by *quasi* public corporations authorized to exercise the right of eminent domain. Evidently the expression 'or other lawful business' was added as a sort of catch-all, for the purpose of including any kind of business for pecuniary profit not elsewhere provided for, and which might have been omitted from the previous particular enumeration."

Brown vs. *Corbin*, 40 Minn. 509.

It is thus seen that the court holds, in short, that the words are a "catch-all" including any other kind of business for a pecuniary profit "not elsewhere provided for." In other words, whatever business a private individual might do, would be lawful for a corporation to do.

The construction given to a statute by those charged with the duty of executing it, will not be overruled without cogent reasons.

United States vs. *Moore*, 95 U. S. 760;
Brown vs. *United States*, 113, U. S. 568.

This rule applies with equal force to the construction given to statutes by the highest courts of the states adopting them.

If there is any business in the pine-forest states of this country which an individual may lawfully do, it is to float or drive his logs to mill or market.

Town of Pierrepont vs. *Loveless*, 72 N. Y. 211.

He may float his logs with the same right that he may transport the products of his farm on a flat boat.

If a stream is naturally of sufficient size to float boats or *mill-logs*, the public have a right to its free use for those two purposes, unincumbered with dams, etc.

Angell on Water Courses (7th Ed.) sec. 537.

Navigation is certainly a lawful business in which any citizen may engage.

The great weight of authority in this country sustains the view that in the timber states especially, where great lumbering interests are carried on, the floating of logs is navigation. Hence streams capable of being so used are called navigable.

Angell on Water Courses, (7th Ed.) sec. 537;
Bouvier, Title, "*Navigable Waters*;"
Morgan vs. *King*, 35 N. Y. at p. 459;
Rhodes vs. *Otis*, 33 Ala. 596;

Moore vs. *Sanborn*, 2 Mich. 519;
Thunder Bay Company vs. *Speechly*, 31 Mich. 342;
Whisler vs. *Wilkinson*, 22 Wis. 549;
Smith & Hambrick vs. *Fonda*, 64 Miss. 551;
Wadsworth vs. *Smith*, 2 Fairchild (Me.) 278;
Brown vs. *Chadbourne*, 31 Me., 9.
Treat vs. *Lord*, 42 Me., 558.
Weise vs. *Smith*, 3 Ore., 445.
Lewis vs. *Coffee County*, 77 Ala. 190.
Olson vs. *Merrill*, 42 Wis., 203.
Cohn vs. *The Wausau Boom Co.*, 47 Wis., 314.

In *Morgan* vs. *King supra*, the Court say:

> "It is not essential to the right that the property to be transported should be carried in vessels, or in some other mode, whereby it can be guided by the agency of man, provided it can ordinarily be carried safely without such guidance."

In *Whisler* vs. *Wilkinson, supra*, the Court say:

> "The rivers of this state capable of floating the products of the country, such as saw-logs or rafts of lumber, to mill or market, are by the common law public highways by water. * * * It would be exceedingly detrimental to the public interests, especially in the pine growing regions of the state, if this were not so."

In *Smith & Hambrick* vs. *Fonda, supra*, the Court say:

> "When the public may rely upon a stream as a safe and convenient means of transporting on it the logs which are cut from the forest on its banks, it is a navigable stream."

Is it credible that in the State of Minnesota where, throughout its entire history both as a territory and a state, so many of its people have been engaged in the business of lumbering, and where many of its streams have been for many years

almost exclusively devoted to the floating of logs, the booming, floating or driving of logs is not a lawful business?

It would seem to be too clear for controversy that the said company could lawfully incorporate under the said title, for all or any of the purposes stated in its articles.

But there is seemingly much force to the view that the corporation may be deemed as organized under said title 1. Conceding for the purposes of the argument only, that the statute was not sufficiently ample at the time when the company was formed to permit its incorporation thereunder, it would now be too late to call into question the validity thereof.

An incorporation attempted only eighteen days prior to the date of the amendment, the amendment completely covering the subject, the state having suffered the incorporation to go unchallenged for a period of two years, it may be presumed that the courts would now recognize the incorporation as valid.

The statute confirms the powers enumerated in the charter.

Stevens Point Boom Co. vs. *Reilly*, 44 Wis., 302.

But section 3 of said chapter 221 expressly provides that it shall apply to corporations previously organized.

But the plaitiff-in-error is estopped to deny the corporate powers of the company.

It is evident from the record that the plaintiff-in-error is one of the parties interested in the operation of the booms at West Newton Slough. (Brief of plaintiff-in-error, p. 9.) It is immaterial, so far as the enforcement of the inspection laws of Minnesota is concerned, whether the boom was in fact operated by the Minnesota Boom Company organized under the laws of this state, or by the Mississippi River Logging Company, or any other company organized as a corporation under the laws of the state of Wisconsin. It is enough to know that it was in fact operated by a *chartered company*. The trial court was evidently satisfied that the evidence warranted the

finding that the Minnesota Boom Company was in charge of it in 1893.

But the allegations of the reply filed by the plaintiff-in-error should not be overlooked. It is there alleged that many of the mill owners residing on the banks of the Mississippi river organized the Mississippi River Logging Company and that the last named company organized the Minnesota Boom Company. (Record 13.) The Mississippi Logging Company also organized the Chippewa Logging Company. (Record 14.)

Frederick Weyerhauser was president of the last named company in 1893, (Record 94), and Thomas Irvine was its secretary. (Record 51.)

The witness, John H. Mullen, testified that he had a conversation with the said Irvine while he was engaged in scaling the logs at the said boom. They were also president and secretary respectively of the Mississippi River Logging Company. (Record 61.)

Q. You may state what he said as to who was in charge of the Minnesota Boom Company.

A. He said Mr. Scott was George Scott. (Record 51.) Mr. Scott, it will be remembered was in charge of the boom. (Record 53, 46.) It was Scott who said that he gave Douglas the orders to cut the line. (Record 46.) The record discloses the existence of a large number of companies engaged in the lumbering business on the Mississippi and its tributaries, all correlated and constituting under the name of the Chippewa Logging Company what the plaintiff-in-error styles in the filed in its behalf "the pool," and the record bears him out. (Record 67.) Out of this combination, and for effectuating the common purpose of booming logs, sprang the Minnesota Boom Company. It was begotten by them and has always been dependent upon them. It is sheer fiction to say that it was not in 1893 fulfilling the purposes of its corporate being. The reply expressly alleges that there the boom at West Newton slough was carried on by the Mississippi Logging Com-

pany in the name of the Minnesota Boom Company. (Record 14.)

It is therefore just to maintain that the doctrine of estoppel applies.

Keeping in mind the policy of the law as to the inspection of logs, we submit that the word charter, as used in the statutes of Minnesota, should not receive a narrow construction; but that such construction should conform to the manifest policy of the state as evinced by the statutes above cited.

It is true that during territorial days, charters were granted by the legislature to certain boom companies; but it would be most detrimental to the public interest, and at variance with the common understanding of the people of that state, to restrict the term "chartered" as employed in said section 2400, to these companies.

We take it to be the settled rule of the courts of this country that where a corporation is organized under a general law, that law is its charter.

> *Thomas* vs. *Railroad Co.*, 101 U. S., 71.
>
> *Oregon Railway Co.* vs. *Oregonian Ry. Co.*, 130 U. S., 1.

> "The general statute, when aroused into specific operation by a compliance with its terms on the part of an association of persons and capital, unites itself with the terms and details of such a compliance; the law and the articles of association become, as it were, the compact between the state and the association, and this constitutes the charter of the body politic."

> *O'Brien* vs. *Cummings*, 13 Mo., App. 197.
>
> *Granger's Life & H. Ins. Co.* vs. *Kamper*, 73 Ala., 340.
>
> *Smith* vs. *Sherry*, 50 Wis., 214.

The articles of association of a company thus organized, taken in connection with the laws under which the organiza-

tion takes place, form the constitution of the association, and answer the same purposes as a special charter.

1 Morawitz Pri. Corp., sec. 318.

Where a company organized under the laws of Minnesota has constructed booms reaching from shore to shore in an interstate stream, forming the boundary between two states, it cannot with commendable grace assert that its acts are *ultra vires* as a defense to an action for the fees which are required to be paid by a chartered company.

The statute will be deemed confirmatory.

> "What the statute authorized to be done after its passage it legalized from thenceforth, as against the state, when done before. It is sufficient here that the respondent's works, as far as authorized by the statute, and so far as the state had power to authorize them, had become legal before the commencement of this suit."

Stevens Point Boom Co. vs. *Reilly*, 44 Wis. 302.

The question involved in *Black River Flooding-Dam Associatinn* vs. *Ketchum*, 54 Wis. 313, cited by the plaintiff-in-error, is not in this suit. There the question was whether the plaintiff was entitled to collect tolls, for logs which had been driven in a certain river. It was not contended that the plaintiff had driven them or performed any service with respect to them; but the right to collect the tolls was based wholly upon the fact that the plaintiff had improved the river.

The Court held that the statute applied only to corporations which had taken prior possession of the river, and, inasmuch as the plaintiff had not done so, it was not entitled to the tolls.

If the Wisconsin Court had been determining rights under a statute like said chapter 221 its decision must have been just

the opposite of the one reached, for the reason that section 2 thereof is as follows:

> "The provisions of this act shall apply as well to corporations *heretofore* organized for the purposes specified in section two (2) of this act, as to those hereafter organized for such purpose."

The right of a corporation to collect tolls upon a public highway must certainly rest upon express statutory authority.

The moment it is conceded, and there would seem to be no escape from the concession, that it was lawful under the lawful business clause of said title 2, to construct booms in the streams of Minnesota, it at once follows that it was lawful to construct the boom in question at West Newton Slough. The only distinction to be drawn between the Mississippi river and other navigable streams is that where it forms the boundary between the two states, those states have concurrent jurisdiction over it. The question of concurrent jurisdiction over such waters is exhaustively considered by the Supreme Court of Wisconsin in the case of

> *J. S. Keator Lumber Co.* vs. *The St. Croix Boom Co.*, 72 Wis. 62,

in which it is said at page 96:

> "The words 'concurrent jurisdiction' must have been used in the compact between the Federal government, Wisconsin and Minnesota, in the sense in which they had previously been used and were generally understood. When, therefore, by such compact it was in effect provided that such state shall have 'concurrent jurisdiction' on that portion of the river St. Croix constituting the boundary line between them, it included the exercise of such legislative powers by each state over the whole river as were consistent with the exercise of similar powers over the same portions of the

river by the other state. In other words, *by such compact each state secured to itself such 'concurrent jurisdiction' upon the half of the river within the territorial limits of the other state, by reducing what would otherwise have been its exclusive jurisdiction upon its own behalf to mere 'concurrent jurisdiction.'*"

It is not necessary to have legislative authority as a prerequisite to the right of constructing a boom in a navigable stream.

Cohn vs. *The Wausau Boom Co.*, 47 Wis. 314;
Canfield vs. *Brig "City of Erie,"* 27 Mich. 479.
Stevens Point Boom Co. vs. *Reilly*, 44 Wis. 295.
McPheters vs. *Moose River Log Co.*, 78 Me. 329.

In *Canfield* vs. *Brig City of Erie*, supra, Judge Cooley says:

> "It it clear that on a river like the Manistee, which is navigable by steamers for a long distance, but down which logs by the million are floated and gathered in booms every season, where in fact the principal industry consists in cutting, floating and manufacturing into lumber the forests in its vicinity, and where the river is more valuable for this floatage than for any other navigation, the necessity and convenience of this floatage must be considered in any rules laid down for the public use of the stream, and the need of booming facilities to render the floatage of value. Indeed, to take away the privilege of booming would be to strike a fatal blow at the principal commerce on the stream; for the vessels which ply between Manistee and other ports are loaded principally with the lumber which the mills along the shores of Manistee lake and river are enabled, by means of the privilege of floating and booming logs upon these waters, to manufacture and place upon the market. It is just and reasonable, therefore, and conducive to the best interests of commerce, that the right of navigating the river should be exercised with due regard to the necessity for boom-

> ing facilities, and the former is not so far paramount as to render the latter a nuisance whenever and wherever it encroaches upon waters navigable by the large vessels which enter this stream. The question whether a nuisance or not, is complicated; it must depend in any case upon the particular facts, and the necessities and conveniences of each interest must be considered and compared before the proper conclusion can be reached."

It is respectfully submitted that the said chapter 221 does not admit of the construction placed upon it by the plaintiff-in-error (Brief 55), in effect, that it does not authorize a company to maintain assorting booms. The very first words of section two are: "Any corporation formed under this title, in whole or in part for the improvement of any stream and driving logs therein, or for holding or handling logs therein." Could language be broader? They may drive, *hold* or *handle* logs. Certain restrictions are provided, among which we note, that navigation of the stream is not to be materially impeded.

Equally fallacious is the contention that said section 2400 does not apply to a company organized under said chapter 221 for the assigned reason that the company is not vested with power to boom all logs floating in the river. It is enough to warrant the application of section 2400 that the company may take possession of "all logs, put into such streams or upon roll ways, so as to impede the drive when the owners thereof or their agents shall not have come upon the stream adequately provided with men, teams and tools for breaking the rollways and driving such logs in season for making a thorough drive down such streams without hindering the main drive." Here is authority to take such forcible possession and against the wishes of owners of such logs. Can any stronger reason be desired why the public officer should supervise? Is it reasonable to assume that the legislature intended to except such companies when it enacted the law of 1889?

In refutation of the suggestion that it might not be lawful for the state to confer power to construct a boom at West Newton Slough under the commerce clause of the constitution, we deem the question determined and settled.

Packet Co. vs. *Keokuk*, 95 U. S. 80;
Packet Co. vs. *St. Louis*, 100 U. S. 423;
Vicksburg vs. *Tobin*, 100 U. S. 430;
Packet Co. vs. *Catlettsburg*, 105 U. S. 559;
Transportation Co. vs. *Parkersburg*, 107 U. S. 698;

II.

The statute of Minnesota prescribing the fees of the surveyor general contemplates the seizure of any logs in payment thereof, irrespective of ownership.

It may be observed at this time that the objection to the statute of Minnesota made by the plaintiff-in-error in the second subdivision of its brief is without force, in view of the facts of this case. The plaintiff-in-error, for all intents and purposes, is the owner of the boom. This fact is developed under the first subdivision of this brief. (Ante.)

The said section 2400 contains no words of limitation or exception. The language is:

> "Every surveyor general, by himself or deputy, shall survey all logs and timber running out of any boom now chartered, or which may hereafter be chartered by law in his district."

The specious argument advanced by the plaintiff-in-error eliminates the question of public policy and proceeds from premises wholly at variance with that policy and not warranted by a fair reading of the provisions of the statute relied on.

This paramount purpose evinced by sections 2400 and 2402 was the provision for a disinterested and impartial sur-

vey of all logs running out of chartered booms. It recognizes the magnitude of the lumbering interests of the state, the constant temptation to override individual rights, and the frauds and abuses which characterize the business when left without public supervision. The record at bar presents a suggestive object lesson. If a public official, in an earnest effort to discharge his duty, could be boldly threatened and embarrassed by a boom company with impunity, the private owner of a small quantity of logs lost in a mass of many millions, would have little hope of securing proper redress. For his protection, the state has seen fit to intervene with its inspection force. It has done in such regard, no more and no less than it has done in providing for the inspection of grain and other commodities, and in the exercise of other supervisory powers.

In support of this view, the language of the Supreme Court of Minnesota is pertinent:

> "Now it appears that there is a large number of persons * * * owning standing timber upon the upper waters of the St. Louis and upon its tributaries, who must float their logs to market down the St. Louis, some to Fond du Lac, Duluth or Superior, and some to Cloquet, or other points above and near Knife River Falls. The interest of the latter requires that their logs should be stoped before passing Knife River Falls; the interest of the former, that their logs should be allowed to run over them without interruption. In this conflict, who is to determine how the right of floatage upon this common highway shall be enjoyed? Who is to fix upon the just and proper compromise of these conflicting interests? Obviously, the legislature—that department of government which, in the exercises of a law-making and a police power, prescribes the rules by which the use of public highways in general is regulated (*Pound* vs *Turck*, 95 U. S. 459; *Watts* vs. *Tittabawassee Boom Co.* 52 Mich. 203), and save as controlled by paramount law—that is to say, in this instance, by our state constitution or enabling act,

> the discretion of the legislature in the premises is practically unlimited. It may enact laws prescribing the manner in which the common right of floatage shall be enjoyed. It may determine what means shall be adopted, and by what agency, to secure results which, in its judgment, are the best and fairest practical compromises of conflicting interests—the best attainable good of all concerned. *Pound* vs. *Turck*, supra; *Duluth Lumber Co.* vs. *St. Louis Boom Co.*, 17 Fed. Rep. 419. In the exercises of its legislative discretion, it may authorize suitable means and instrumentalities to secure this end to be provided and employed by a private person or by a corporation, and it may prescribe what these means and instrumentalities may be, as booms, dams, piers, sluice ways, and what use may be made of them, and, in general, in what manner the business shall be conducted. * * * * * On the whole, this is an improvement of the river for the the benefit of all concerned in its use, and one for which it is therefore competent for the legislature to require those using the river to make compensation."

Osborne vs. *Knife Falls Boom Corp.*, 32 Minn., 412.

As stated by the Court in *Hospes* vs. *O'Brien*, 24 Fed., 147.

> "The state derives no revenue from the measurement and scaling of logs, and the only object of the law is to ascertain whether the logs are fit for commerce, and to protect the citizens and market from fraud."

Such companies are *quasi* public corporations.

Osborne vs. *Knife Falls B. Co. supra;*
West Branch Boom Co. vs. *Penn. Joint Lumber Co.*, 121 Pa. St., 158.
Cohn vs. *Wausau Boom Co.*, 47 Wis., 314.

That the enforcement of the lien may result in distraining logs not owned by the boom company, presents no valid objection to the law. It was the duty of the boom company to

pay the inspection fee. It owed that duty to every owner whose logs came into its possession and could undoubtedly recover from the owner the amount so expended. It had authority to retain the logs and enforce its statutory lien for dues and lawful advances. Its booms were so constructed as to permit the holding of sufficient logs to protect itself. Failing to do this and thus suffering a seizure and sale of the logs, it at once became liable to the owner in damages.

To hold that the officer must segregate the logs of different owners for the purpose of enforcing his lien, would at once nullify the law. Such a course would be utterly impracticable. Logs can only be inspected while in the pockets preparatory to being brailed. They cannot then be separated. They must go out from the brailing pocket into the stream below. But they always go out in brails. Moreover, the demand for fees can only be made when the scale bill is made out at the end of each month. When the bill is made out the great mass of the logs inspected have been towed down the river by steam boats —in the case of West Newton Slough—and may be beyond the boundary of the state.

The case of *Appleman* vs *Myr*, 74 Mich. 356, is easily distinguishable. There the defendant, a contractor, had contracted with different parties to drive their logs. He had contracted with some of them to also cut and bank their logs. He employed the plaintiff to cut, bank and drive logs. Plaintiff claimed a lien upon a quantity of logs, irrespective of ownership, for labor performed in driving the whole mass. *Held*, he could not in such a case hold the logs of one for the labor performed for another.

In the case at bar, a statute is involved which is notice to all who allow their logs to float unbrailed down the river and into the boom. They enjoy the benefits of the statute burdened with the liabilities it imposes. They know before their logs are rolled into the stream that if they enjoy the benefits of the boom their logs become liable for the inspection fees due

from its owner or proprietor. No contract relationship arises between the officer and the owner of the logs. He takes no note of ownership. He scales the mass of logs issuing from the boom. He is in the employ of no one save the state.

The logs are placed in his district pursuant, in part, to the will of the plaintiff-in-error, in an almost inextricable mass.

They are in the possession of the boom company, which alone is authorized to separate the diverse ownerships therein, place them in various "pockets" of the company, brail and retain them until the charges of the boom company, as well as the expenses of the state inspection are paid.

The exigencies of commerce require these logs to be so checked in their pilgrimage.

Under the authority conferred by the state of Minnesota, the boom company is privileged to act and charge for its services without regard to the request or desire of the owners. Can it not be urged with force, that where these logs are physically within the state of Minnesota, and the exigencies of commerce require not only the inspection and registration of the various ownerships, but the separation and marshalling of this mass of property—that they must be treated for all purposes as *temporarily* the property of the boom company, which has exclusive jurisdiction over them?

And does it not follow that for the purpose of collecting the charges of the surveyor general of the state therein the logs should be treated as a continuing mass in the same condition in which the surveyor general found them? If so, it follows the surveyor general in case of non-payment of his statutory fees of five cents per thousand feet is entitled to retain any part of this mass of logs to secure such payment, and until the boom company which has sole and continuing control of the logs and represents by implication all owners, pays such charges.

III.

The fees of the surveyor general become due and payable at the end of the month and before the scale bill is recorded.

So far as material, the statutes provide:

"Each surveyor general, by himself or deputy, shall survey all logs and timber running out of any boom now chartered, or which may hereafter be chartered by law in his district, *and at the end of each month when he has surveyed any such logs or timber, make out and deliver to the owner of such boom, or the managing agent thereof a true and correct scale bill,* stating the date of such survey, the number of logs and piece of timber, the marks thereon respectively, and the number of feet of each mark so surveyed during the month, and shall sign the same; and he shall immediately record such bill in the books of his office, and, upon being paid his fees for such services, shall deliver the original bill to the owner or managing agent of such boom; and all boomage or fees of such boom on any logs or timber shall be collected in accordance with such survey. And all scale bills heretofore made and signed by any such surveyor general, as the record thereof in the respective offices of such surveyor generals, or copies of such records, duly certified, shall, in all courts of this state, be *prima facie* evidence of the matters stated in such scale bill, record or copy."

General Statutes 1894, sec. 2400;

"The fees of surveyor generals shall be: for surveying, scale-marking, making scale-bills and recording the same and posting in the ledger, five cents per thousand feet for all logs and timber required to be surveyed; for surveying lumber, twenty-five cents per thousand feet; for traveling to perform any service more than two miles from their respective offices, five cents per mile going and returning; for recording any log-

mark, fifty cents; for making and certifying a copy of any matter which may be of record in his office, or for making any duplicate scale-bill, ten cents per folio; for recording any instrument in writing authorized to be recorded in his office, other than scale-bills, ten cents per folio, payable when such instrument is presented for record and before it is recorded, and no such instrument shall be deemed to be recorded until it is entered upon the index of the record. And for the purpose of securing to the surveyor general the payment of his fees, whether the same are for traveling, surveying, making scale-bills, or recording the same, or for any or all of such services such surveyor-general shall have a lien upon all such logs, timber or lumber surveyed and marked by him, for the amount due for his services thereon and may retain such lien by affixing to the scale-bill of such logs, timber or lumber, before the delivery thereof, a true statement of the amount due him thereon, and that he scaled such logs, timber or lumber, relying upon such lien, and that he claims a lien thereon for such amount, and costs of collection; and thereupon such surveyor general may take actual possession of a sufficient quantity of such logs, timber or lumber, and may retain the same until he is paid the amount due him thereon, and such logs, timber or lumber shall not be removed or taken from the possession or control of such surveyor general until such payment is made. If the amount is not paid within sixty days after the delivery of such scale-bill, the surveyor general may sell at public auction enough of such logs, timber or lumber to pay the amount due him, with the costs of collection, first giving ten days notice of such sale, by posting up five written notices thereof, one in his office, and one in each of the four most public places in the town or city where the sale is to be made; and at such sale the surveyor general may become the purchaser. The sale may be made by the sheriff or any constable of the county, and the only costs of collection allowed shall be ten per cent. on the amount due, for taking care of the property and, to the officer making

the sale, ten per cent. on the amount payable to the surveyor general."

General Statutes 1894, section 2402.

"The books of record in the surveyor general's office in each district shall be:

"First. A book in which shall be recorded the log mark of any person desiring to have the same recorded.

"Second. A book in which shall be recorded all bills of sale, mortgages, and orders, and other instruments in writing for the sale, transfer, incumbrance or delivery of any logs or timber in the same district.

"Third. A book in which shall be recorded the scale bills of all the logs, timber and lumber surveyed by the surveyor general.

"Fourth. A book, to be kept in ledger form, in which shall be posted and recorded, as soon as any logs or timber is surveyed, separately and under their respective marks, all the logs and timber of each particular mark surveyed, together with the date of scale, the number of logs and the number of pieces of timber, to whom scaled, if to any one, and the number of feet, which book shall be kept posted up so that it will show the matter above stated concerning each mark of logs scaled during each month. And the surveyor general shall make and deliver to any person authorized to demand the same, a certified transcript of said record, as to any mark or marks of logs or timber, upon being paid the fees prescribed in section sixteen of this chapter, and the sum of twenty-five cents for his certificate of the same; and an index of the names and marks contained in each of said books shall also be kept. Any books of the description before named, which have been kept in the office of any such surveyor general, and which belong to said office, are hereby declared to be the records of said office, and to have and be of the same validity, force and affect as if the same had been kept by express authority of law. All the books of record hereinbefore mentioned and

authorized to be kept in the office of any surveyor general are hereby declared to be public records, and of as high degree of evidence as the original instrument therein recorded and shall, in all courts and places in this state, be taken and held to be *prima facie* evidence of the matters therein stated; and such books shall not be removed from the surveyor general's office, but any paper purporting to be a copy of any matter or thing of record in such office, certified under the hand of the surveyor general or his deputy to be a correct transcript from the records in such office, shall, in all the courts of this state, be received and read as *prima facie* evidence of the matters and things in such record contained, and of the matters therein stated."

General Statutes, section 2403.

It is thus clearly obvious from section 2400 that the recording is not a necessary prerequisite. It was the official's duty to deliver a scale bill to the owner and agent at the end of the month. Two scale bills are plainly intended, namely, the one an original, and the other, a copy. The latter is served at the end of the month, and before payment of the fees. The original is retained to be recorded in the books of his office. When so recorded, the owner is entitled to a delivery thereof upon payment of the amount of inspection fees due the officer. The original and not the copy, when delivered, is made *prima facie* evidence.

It does not lie in the mouth of the boom-owner who has refused to pay the fees that the original has not been recorded. By a payment of such fees he would have secured possession of the original bill itself which would be even better evidence than the record thereof; for, in such a case, the record could not be of higher evidence than the original from which it was made.

The statute expressly provides that "the records shall be of as high degree of evidence as the original instruments

therein recorded." That is to say, all are only *prima facie* evidence.

Plaintiff-in-error questions the authority of the legislature to make scale bills evidence. Such authority would seem to be undoubted.

Campbell vs. *LaClede Gas Co.*, 119 U. S. 446.
Philadelphia, etc., R. R. Co. vs. *Stimpson*, 14 Pet. 448.
Owings vs. *Speed*, 5 Wheat. 420.
United States vs. *Gaussen*, 19 Wall. 198.
United States vs. *Bell*, 111 U. S. 477.
Callanan vs. *Hurley*, 93 U. S. 387.
City of St. Joseph, vs. *Farrell*, 106 Mo. 437.

The whole subject is under the control of the legislature, which prescribes such rules for the trial and determination as well of existing as of future rights and controversies, as in its judgment will most completely subserve the ends of justice.

Cooley Const. Lim. (6th Ed.), 451.
Himmelman vs. *Carpenter*, 47 Cal. 42.
Delaplaine vs. *Cook*, 7 Wis. 43.

We do not contend that it was not the duty of the surveyor general to record the scale bills. Our contention is that it was not necessary that he do so as a prerequisite to his right to his fees. We confidently maintain that the construction we have placed upon the statute comports with its spirit and intent.

If this view prevails, it is then obvious that the trial court did not err in excluding evidence bearing on the question of the character of the record nor was it material whether any record at all was made.

The omission to make the record would at worst be an

irregularity and so would not affect the legal force of the scale bill.

Fish vs. *Emerson*, 44 N. Y. 376;
Gunn vs. *Plant*, 94 U. S. 664;
Hopper vs. *Lucas*, 86 Ind. 50.

In *Fish* vs. *Emerson*, *supra*, the court say:

> "The duty of entering it (a judgment of a justice of the peace) in his docket has been held to be directory merely, owing to its ministerial character, and although the time is prescribed by the statute to be four days, within which it is to be done, that is not a limitation upon the power of the justice, but it may be validly prepared long afterwards. * * * * It is also well settled by the authorities cited that the subsequent entry of the judgment in the docket of the justice is valid, although done long after its rendition."

Much stress is placed by plaintiff-in-error upon the ruling of the trial court excluding evidence offered for the purpose of impeaching the scale bills. (Defendants exhibits, 3 and 4.) But the ruling was unavoidable in view of the character of the evidence offered. A few explanatory words will suffice to show the correctness of the ruling.

The defendant-in-error had introduced scale bills showing the marks to which logs had been scaled. The plaintiff-in-error then produced a witness (Record 98), a clerk in the office of the boom company, by whom it was sought to show that he had never seen any of the marks appearing upon exhibit F which had been selected from the scale bills, and that he had never seen logs coming into the boom bearing such marks. Plaintiff-in-error offered to follow up the proposed testimony by other like evidence to the effect that they were marks that nobody knew or ever saw; that the scalers had never found them; that it wouldn't be possible for the quantity of logs purporting to have been scaled daily to such marks to run through the booms on the respective days.

The evidence was excluded for the reason that it was negative, immaterial, and the witness incompetent to testify. It was a wholesale offer at best, a blending of competent and incompetent matter, not followed up by the production of any other witness by whom the proofs were sought to be made, but made undoubtedly in good faith.

As the case stood at the time the ruling was made, the witness was clearly incompetent.

In *Pollard and Picket* vs. *Dwight*, 4 Cranch. 421, it was attempted to prove that a certain survey could not have been made by offering to produce two other surveys made by the same person for another party only two days after the completion of the survey relied upon by the opposing party. The Court say:

> "The surveys * * * were introduced for the purpose of showing that the patent for the lands sold * * * was void, because it issued on a plat representing a survey which, in point of fact, could not have been made. * * * The surveyor was a sworn officer, and his survey was returned upon oath. This is an attempt to invalidate the evidence derived from his official return, by a particular fact which has no relation to the cause before the Court, and with which the parties to this controversy had no connection."

Conceding, for the purposes of the argument only, that inaccuracies had crept into the scale bill, the seizure could not be defeated for such reason. The offer was made to prove that out of the 500,000,000 feet of logs scaled something like a million feet appeared upon the scale bills with marks unknown to employes of the boom, and that they were not in fact in the brails to which they had been accredited. Granting this to be true, it amounted only to an error of *one* foot in *five hundred*. The fees of the officer, even if they could have been reduced by force of such evidence, would suffer a diminution of not to exceed fifty dollars.

The court ruled upon *such an offer* and held the evidence immaterial.

Some point is attempted to be made of the fact that a seizure was made before the June scale bill had been made out.

The evidence is that the May bill had not been paid. The seizure of logs for the June bill was made two or three days before the end of the month. The officer was dealing with a company which was bent on resisting the enforcement of his lien. The case fully warranted his action. No injustice was done. He scaled the logs and delivered the scale bill to the agent of the company.

Keeping in mind that the plaintiff-in-error was, for all intents and purposes, the boom company, and it had refused to pay the fees, it cannot now with any degree of justice claim that the officer did not strictly comply with the statute in the performance of his duty. There is a presumption, in the absence of evidence upon the subject, that the survey had been completed and that the seizure was necessary when made in order to enforce the officer's lien. A case is readily imagined when, at the end of the month, when the scale bills were to be delivered, the boom would be empty.

IV.

The statute of Minnesota is a legitimate police regulation and not a regulation of interstate commerce. In short, it is an inspection law.

Cooley on Const. Lim. 6th Ed. 595.
Turner vs. *Md.*, 107 U. S. 38.
Hospes vs. *O'Brien*, 24 Fed. Rep. 145.
Minnesota vs. *Barber*, 136 U. S. 328.
Swift vs. *Sutphin*, 39 Fed. Rep. 630.
Cooley vs. *Board of Wardens*, 12 How. 299.

Owners of James Gray vs. *Owners of the John Frazer*, 21 How. 184.

Benedict vs. *Vanderbilt*, 1 Robertson, 194.

Steamship Co. vs. *Joliff*, 2 Wall. 450.

Wilson vs. *McNamee*, 102 U. S. 572.

Gilman vs. *Philadelphia*, 3 Wall. 713.

Patterson vs. *Ky.*, 97 U. S. 501.

Tiedman on Pol. Power, 207.

Walling vs. *Michigan*, 116 U. S. 446.

Pittsburg, etc., Coal Co. vs. *Louisiana*, 156 U. S. 590.

Sherlock vs. *Alling*, 93 U. S. 99.

Wiggins Ferry Co. vs. *East St. Louis*, 107 U. S. 365.

People vs. *Compagnie*, 107 U. S. 62.

Huse vs. *Glover*, 119 U. S. 547.

Packet Co. vs. *Keokuk*, 95 U. S. 84.

Transportation Co. vs. *Parkersburg*, 107 U. S. 691.

Sands vs. *Manistee River Imp. Co.*, 123 U. S. 288.

Palmer vs. *Commrs.*, 3 McLean, 226.

Kellogg vs. *Union Co.*, 12 Conn. 26.

Gibbons vs. *Ogden*, 9 Wheat. 203.

Gloucester Ferry Co. vs. *Penn.*, 114 U. S. 196.

Eddson vs. *Minnesota*, 166 *U. S.*, 427.

"The right to pass inspection laws and to levy duties so far as may be necessary to render them effectual, is also undoubted, and is expressly recognized by the Constitution. But certain powers which still more directly effect commerce may sometimes be exercised when the purpose is not to interfere with congressional legislation, but merely to regulate the times and manner of transacting business with a view to facilitate trade, secure order and prevent confusion."

Cooley on Const. Lim., (6th Ed.,) 721.

Inspection laws fall within the police powers of the state.

"The police of a state, in a comprehensive sense,

> embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others."
>
> *Id. 704.*

> "If the power extends only to a just regulation of rights with a view to the due protection and enjoyment of all, and does not deprive any one of that which is justly and properly his own, it is obvious that its possession by the state, and its exercise for the regulation of the property and actions of its citizens, cannot well constitute an invasion of national jurisdiction, or afford a basis for an appeal to the protection of the national authorities."
>
> *Id. 707.*

If the business in question contains an element of danger to the public, it may be subjected to regulations designed to protect the public against injury; it may be made subject to inspection, and a license fee may be exacted in aid of its inspection laws.

Tiedman on Pol. Power, Sec. 202.

In *Huse vs. Glover,* 119 U. S. 547, was considered the validity of a law authorizing the collection of tolls for the passage of vessels through locks which had been constructed in the Illinois river pursuant to such law, and this Court say:

> "The exaction of tolls for passage through the locks is as compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream. The provision of the clause that the navigable streams should be highways without any

tax, impost, or duty, has reference to their navigation in their natural state. It did not contemplate that such navigation might not be improved by artificial means, by the removal of obstructions, or by the making of dams for deepening the waters, or by turning into the rivers waters from other streams to increase their depth. For outlays caused by such works the state may exact reasonable tolls. They are like charges for the use of wharves and docks constructed to facilitate the landing of persons and freight, and the taking them on board, or for the repair of vessels.

"The state is interested in the domestic as well as in the inter-state and foreign commerce conducted on the Illinois river, and to increase its facilities, and thus augment its growth, it has full power. It is only when, in the judgment of Congress, its action is deemed to encroach upon the navigation of the river as a means of inter-state and foreign commerce, that that body may interfere and control or supersede it. If, in the opinion of the state, greater benefit would result to her commerce by the improvements made, than by leaving the river in its natural state—and on that point the state must necessarily determine for itself—it may authorize them, although increased inconvenience and expense may thereby result to the business of individuals. The private inconvenience must yield to the public good. The opening of a new highway, or the improvement of an old one, the building of a railroad and many other works, in which the public is interested, may materially diminish business in certain quarters and increase it in others; yet, for the loss resulting, the sufferers have no legal ground for complaint. How the highways of a state, whether on land or by water, shall be best improved for the public good is a matter for state determination, subject always to the right of Congress to interpose in the cases mentioned. Spooner vs. McConnell, 1 McLean, 337; Kellogg vs. Union Co., 12, Conn. 7; Thames Bank vs. Lovell, 18 Conn. 500; S. C. 46 Am. Dec. 332; McReynolds vs. Smallhouse, 8 Bush, 447."

An act of the legislature of Iowa creating the City of Keokuk gave to the city council power to establish and regulate wharves, and to fix the rates of landing and wharfage of all boats, rafts and water crafts moored at or landing at the wharves. An ordinance was passed by the city providing that certain ground extending to the middle channel of the Mississippi river should be declared a wharf and be subject to be used for such purpose under such conditions as might be prescribed by ordinance. Wharfage fees were provided graduated according to the tonnage of the craft using the wharf. The collection of the fees was resisted by the plaintiff-in-error merely upon the ground that the ordinance was invalid because it sought to impose a duty on tonnage and was a regulation of commerce such as Congress only is authorized to make.

In *Packet Co.* vs. *Keokuk*, 95 U. S. 84, the Court say:

"The principal question presented by the record of this case is, whether a municipal corporation of a state, having by the law of its organization an exclusive right to make wharves, collect wharfage, and regulate wharfage rates, can, consistently with the Constitution of the United States, charge and collect wharfage proportioned to the tonnage of the vessels from the owners of enrolled and licensed steamboats mooring and landing at the wharves constructed on the banks of a navigable river.

"The city of Keokuk is such a corporation, existing by virtue of a special charter granted by the legislature of Iowa. * * * * * *

"To determine whether the charge prescribed by the ordinance in question is a duty of tonnage, within the meaning of the Constitution, it is necessary to observe carefully its object and essence. If the charge is clearly a duty, a tax or burden, which in its essence is a contribution claimed for the privilege of entering the port of Keokuk, or remaining in it, or departing

from it, imposed, as it is, by authority of the state, and measured by the capacity of the vessel, it is doubtless embraced by the constitutional prohibition of such a duty. *But a charge for services rendered or for conveniences provided is in no sense a tax or a duty. It is not a hindrance or impediment to free navigation.* The prohibition to the state against the imposition of a duty of tonnage was designed to guard against local hindrances to trade and carriage by vessels, not to relieve them from liability to clalms for assistance rendered and facilities furnished for trade and commerce. It is a tax or a duty that is prohibited; something imposed by virtue of sovereignty, not claimed in right of proprietorship. Wharfage is of the latter character. Providing a wharf to which vessels may make fast, or at which they may conveniently load or unload, is rendering them a service. The character of the service is the same whether the wharf is built and offered for use by a state, a municipal corporation, or a private individual; and when compensation is demanded for the use of the wharf, the demand is an assertion, not of sovereignty, but of a right of property. A passing vessel may use the wharf or not, at its election, and thus may incur liability for wharfage or not at the choice of the master or owner. No one would claim that a demand of compensation for the use of a drydock for repairing a vessel, or a demand for towage in a harbor, would be a demand of a tonnage tax, no matter whether the dock was the property of a private individual or a state, and no matter whether proportioned or not to the size or tonnage of the vessel. There is no essential difference between such a demand and one for the use of a wharf. It has always been held that wharfage dues may be exacted; and it is believed that they have been collected in ports where the wharves have belonged to the state or a municipal corporation ever since the adoption of the Constitution. * * *

"For these reasons, we hold that the ordinance cannot be considered as imposing a duty of tonnage,

> and what we have said is sufficient to show that most of the other objections of the plaintiffs-in-error to its validity have no substantial foundation. It is in no sense a regulation of commerce between the states, nor does it impose duties upon vessels bound to or from one state to another, nor compel entry or clearance in the port of Keokuk; nor is it contrary to the compact contained in the ordinance of 1787, since it levies no tax for the navigation of the river; nor is it in conflict with the act of Congress respecting the enrollment and license of vessels for the coasting trade. All these objections rest on the mistaken assumption that port charges, and especially wharfages, are taxes, duties, and restraints of commerce."

So in the case at bar, the law of Minnesota in providing for the boomage and inspection of logs, a service is rendered to commerce and to every person who employs the boom. From the very nature of the logging business, the citizens of Minnesota who are compelled to float their logs along this natural highway are entitled to such a police regulation. No argument is necessary to demonstrate the wisdom of the regulation. The commingling of logs either through unavoidable accident or fraudulent design, must necessarily be attended with great loss to certain owners if provision be not made by the public for an impartial supervision by public officers at some convenient place. What more practicable arrangement can be provided than inspection at the booms into which the great mass of logs are gathered?

The case of *Transportation Co. vs. Parkersburg*, 107 U. S. 691, also involved the validity of a city ordinance exacting wharfage fees. The general subject of the powers of state to legislate in local matters in there discussed, and the Court say:

> "The power of the states to legislate in matters of a local character, where Congress has not by its own action covered the subject, is quite fully discussed by Mr. Justice Field in delivering the opinion of this Court

in Mobile Co. vs. Kimball, 102 U. S. 691, where the distinction taken in Cooley vs. Board of Wardens, between those subjects which are national in their character and require uniformity of regulation, and those which are local and peculiar to particular places, is commented upon and enforced. Amongst other things, it is there said: 'Where from the nature of the subject or the sphere of its operation the case is local and limited, special regulations adapted to the immediate locality could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress, for when that acts the state authority is superseded. Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the states and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being, and until it sees fit to act they may be regulated by state authority.' See also the remarks of the Chief Justice in *Hall* vs. *DeCuir*, 95 U. S. 485. * * * *

"In the various bridge cases that have come before the Courts of the United States, where bridges (or dams) have been erected by state authority across navigable streams, the refusal to interfere with their erection has always been based upon the absence of prohibitory legislation by Congress, and the power of the states over the subject in the absence of such legislation. Where the regulation of such streams by Congress has been only of a general character, such as the establishment of ports and collection districts thereon, it has been held that the erection of bridges, furnished with convenient draws, so as not materially to interfere with navigation, is within the power of the states, and not repugnant to such general regulation. The former cases on this subject are reviewed in

Trans. Company vs. *Chicago, ante*, p. 678.

"It is believed that no case can be found in which

> state laws, or regulation under state authority, on subjects of a local nature have been set aside on the ground of repugnance to the power of regulating commerce given to Congress, unless it has appeared that they were contrary to some express provision of the Constitution, or to some act of Congress, or that they amounted to an assumption of power exclusively conferred upon Congress."

It will not be contended surely that Congress has anywhere undertaken to legislate upon the subject in question.

A statute of Michigan authorized improvements to be made in the Manistee river by a certain company, consisting in the removal of obstacles to the floating of logs and lumber down the stream. Tolls were authorized to be fixed at proper rates for running vessels, boats, rafts, timber, logs or lumber through the improved stream. The river was wholly in the State of Michigan. An action was brought to collect tolls for several years, and was resisted on the ground that the imposition of the toll was the taking of property without due process of law. To this contention it was said in *Sands* vs. *Manistee River Imp. Co.*, 123 U. S. 288:

> "The plaintiff-in-error, the defendant below, misapprehends the purport of the provision that no state shall deprive one of property without due process of law, when he considers the exaction of tolls under a statute for the use of an improved waterway as a deprivation of property within its meaning. There is no taking of property from him by such exaction within the prohibition, any more than there is a taking of property from a traveler, in requiring him to pay for his lodgings in a public inn. There is in such a transaction only an exchange of money for its supposed equivalent. The tolls exacted from the defendant are merely compensation for benefits conferred, by which the floating of his logs down the stream was facilitated.
>
> "There is no analogy between the imposition of taxes and the levying of tolls for improvement of high-

ways; and any attempt to justify or condemn proceedings in the one case, by reference to those in the other, must be misleading. Taxes are levied for the support of government, and their amount is regulated by its necessities. Tolls are the compensation for the use of another's property, or of improvements made by him; and their amount is determined by the cost of the property; or of the improvements and considerations of the return which such values or expenditures should yield. The legislature, acting upon information received, may prescribe at once, the tolls to be charged; but, ordinarily, it leaves their amount to be fixed by officers or boards appointed for that purpose, who may previously inspect the works, and ascertain the probable amount of business which will be transacted by means of them, and thus be more likely to adjust wisely the rates of toll in conformity with that business. This subject, like a multitude of other matters, can be better regulated by them than by the legislature. In the administration of government, matters of detail are usually placed under the direction of officials. The execution of general directions of the law is left, in a great degree, to their judgment and fidelity. Any other course would be attended with infinite embarrassment.

"In authorizing the Board of Control to fix rates of toll for the floating of logs and timber over the improved portions of the Manistee river, certain limits are prescribed to its action; but within those limits the matter is left to its judgment. No notice can be given to parties, who may have occasion to use the stream, to attend before the board and present their views upon the tolls to be charged. Such parties cannot be known in advance. The occasion for using the improved stream may arise at any time in the year; perhaps after the tolls have been established. The whole subject is one of administrative regulation, in which a certain amount of discretionary authority is necessarily confided to officers entrusted with its execution. Should there be any gross injustice in the rate of tolls fixed, it

would not, in our system of government, remain long uncorrected.

"The Manistee River is wholly within the limits of Michigan. The state, therefore, can authorize any improvement which in its judgment will enhance its value as a means of transportation from one part of the state to another. The internal commerce of a state — that is, the commerce which is wholly confined within its limits — is as much under its control as foreign or interstate commerce is under the control of the general government; and, to encourage the growth of this commerce and render it safe, the states may provide for the removal of obstructions from their rivers and harbors, and deepen their channels, and improve them in other ways, if, as is said in County of Mobile vs Kimball, the free navigation of those waters, as permitted under the laws of the United States, is not impaired, or any system for the improvement of their navigation provided by the general government is not defeated. 102 U. S. 691, 699. And to meet the cost of such improvements, are, in that respect, like wharves and docks constructed to facilitate commerce in loading and unloading vessels. *Huse* vs. *Glover*, 119 U. S. 543,548. Regulations of tolls or charges in such cases are mere matters of administration, under the entire control of the state."

The mere fact that a slight delay may attend the inspection of the logs, does not present a case of a violation of the commerce clause of the constitution.

The compact in the ordinance of 1787 creating the state of Ohio provided that "the navigable waters leading into the Mississippi and St. Lawrence and the carrying places between the same, shall be common highways and forever free * * * without any tax, impost or duty therefor." An application was made for an injunction to prevent the construction of a drawbridge over the Cuyahoga river on the ground that it would obstruct the navigation of the river. The court in *Palmer* vs. *Commrs*, *3* McLean, 226, said:

"A toll charged for the improvement of the navigation of a river, is not within the ordinance. In such a case the tax would not be for the use of the river in its natural state, but for the increased commercial facilities. A drawbridge across a navigable water is not an obstruction. As this would not be a work connected with the navigation of the river no toll, it is supposed, could be charged for the passage of boats. But the obstruction would be only momentary, to raise the draw; and as such a work may be very important in a general intercourse of the community, no doubt is entertained as to the power of the state to make the bridge. It is one of those general powers possessed by a state for the public convenience, and may be exercised, provided it does not infringe on the federal powers, or violate the limitations in the ordinance."

A statute of Connecticut authorized a company to improve the Connecticut river so as to be navigable for vessels and to collect tolls from vessels drawing more than six feet of water.

To the contention that the law was in violation of the commerce clause of the Federal Constitution the Supreme Court of Connecticut in *Kellogg* vs. *The Union Company*, 12 Conn. 26, say:

"It is very obvious that the act was not intended to impose, nor does it impose, any tolls upon vessels which, in ordinary seasons, might have passed up and down the river in its unimproved state. Congress has made Hartford a port of delivery. The effect of this charter is, to make that port accessible to vessels, to which it was not before accessible; and upon these, and upon these only, a toll is imposed. Does such a charter conflict with the law of Congress? Is it not rather in furtherance of the law? Suppose Enfield were to be made a port of entry; would the canal around the falls cease to be the property of the company by whom it has been constructed, under a charter from the state?

> The principle contended for most palpably denies to the states all power of improving their navigable waters. Such power certainly did exist in the states, before the delegation of power to the general government by the federal constitution. Is this among the delegated powers? And is it so delegated as that it ceases to exist in the states? That there is any such express delegation, is not pretended. If such delegation is to be found in the Constitution it is, confessedly in that clause of it, so often adverted to, which empowers Congress to regulate commerce with foreign powers and among the states. And that such power was not intended nor understood to be delegated by that clause in the Constitution, we have already said, is very manifest from the whole current of state legislation on this subject; and from the acquiesence of the general government, as well as upon the authority of decided cases.
>
> "Upon the whole we are of opinion that there is no foundation for the several objections urged against a recovery in this case; and that the plaintiffs are entitled to retain their verdict."

State inspection laws, health laws, and laws for regulating the internal commerce of a state, and those respecting turnpike roads, ferries, etc., are not within the power granted to Congress. This was clearly stated by Chief Justice Marshall in *Gibbons* vs. *Ogden*, 9 Wheat. p. 203.

> "But, the inspection laws are said to be regulations of commerce, and are certainly recognized in the Constitution, as being passed in the exercise of a power remaining with the states.
>
> "That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws, is to improve the quality of articles produced by the labor of a country; to fit them for exportation; or, it may be for domestic use. They act upon the subject before it be-

comes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces everything within the territory of a state, not surrendered to the general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass." (p. 203.)

"Inspection laws are of a more equivocal nature, and it is obvious, that the Constitution has viewed that subject with much solicitude. But so far from sustaining an inference in favor of the power of the states over commerce, I cannot but think that the guarded provisions of the 10th section, on this subject, furnish a strong argument against that inference. It was obvious, that inspection laws must combine municipal with commercial regulations; and, while the power over the subject is yielded to the states, for obvious reasons, an absolute control is given over state legislation on the subject, as far as that legislation may be exercised, so as to affect the commerce of the country. * * * *

"It would be in vain to deny the possibility of a clashing and collision between the measures of the two governments. The line cannot be drawn with sufficient distinctness between the municipal powers of the one, and the commercial powers of the other. In some points they meet and blend so as scarcely to admit of separation. Hitherto the only remedy has been applied which the case admits of—that of a frank and candid co-operation for the general good. Witness the laws of Congress requiring its officers to respect the inspection laws of the states, and to aid in enforcing their health laws; that which surrenders to the states the superintendence of pilotage, and the many laws passed to permit a tonnage duty to be levied for the

> use of their ports. Other instances could be cited, abundantly to prove that collision must be sought to be produced; and when it does arise, the question must be decided how far the powers of Congress are adequate to put it down. Wherever the powers of the respective governments are frankly exercised, with a distinct view to the ends of such powers, they may act upon the same object, or use the same means, and yet the powers be kept perfectly distinct. A resort to the same means, therefore, is no argument to prove the identity of their respective powers." (p. 235-8.)

In *Turner* vs. *Maryland*, 107 U. S., 38, was involved the validity of a certain statute of Maryland relating to the inspection of tobacco.

A synopsis of the statute begins on page 41.

Essential part of decision begins on page 48.

The opinion refers to a valuable note at foot of page 51 showing inspection laws adopted by the several colonies prior to and in force at the time of the adoption of the federal constitution; also a note at foot of page 53 showing the sense in which many of the states have understood the meaning of the terms "inspection laws."

The inspection of logs as carried on at West Newton Slough is not a regulation of commerce, but a reasonable and authorized exercise of the police power of the state.

> "'General legislation of this kind, prescribing the liabilities or duties of citizens of a state, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce. Objection might, with equal propriety, be urged against legislation prescribing the form in which contracts shall be authenticated or property descend or be distributed on the death of its owner, because applicable to the contracts or estates of persons engaged in such commerce. In conferring upon congress the regulation of commerce it

was never intended to cut the states off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution. * * * And it may be said, generally, that legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate or in any other pursuit.'

"We do not think that the statute of Louisiana was in conflict with the commercial power of congress prescribed by the constitution, and the supreme court of Louisiana did not err, therefore, in sustaining it. It provided only a regulation for the measurement of the coal and coke boats on the Mississippi, and of the coal and coke carried, which neither increased nor impaired the commerce of the country in the carrying form of the boats or in the coal and coke carried."

Pittsburgh, etc., vs. *Louisiana, 156 U. S. 599.*

The character of the business as disclosed by the evidence conclusively demonstrates that it is a proper subject for the attention of the state. It is difficult to find in all of the cases extant a subject to which state inspection can more appropriately be applied. The works are so constructed as to bring within the boom every loose log which floats down the Mississippi river. The evidence shows that "scrabbles" and prize logs have found their way into it.

But the law was not enacted for any particular boom, but for every chartered boom constructed on any of the waters of the state. The law makes no exceptions. The legislature never intended that it should be withheld in its operation from

a given boom upon the ground that such boom was constructed for the sole convenience of its owners or certain patrons, in handling logs cut in a particular district, whether within or without the state.

The contention of plaintiffs that the boom is a mere incident to their business of transporting their logs from the banks of the Chippewa to the State of Iowa or elsewhere, is wholly without force, and unsupported by any well considered case. It is opposed by the great weight of judicial authority in this country.

The foregoing authorities enunciate the following principles, which, it is believed, are unshaken by any subsequent decisions of this court.

1. It is only when, in the judgment of congress, the action of a state is deemed to encroach upon the navigation of a river as a means of interestate and foreign commerce, that that body may interfere and control or supersede it.

Huse vs. Glover, supra.

2. How the highways of a state, whether on land or by water, shall be best improved for the public good, is a matter for state determination, subject always to the right of congress to interfere.

Id.

3. A charge for services rendered or for conveniences provided is in no sense a tax or a duty. It is not a hindrance or impediment to free navigation.

Packet Co. vs. Keokuk, supra.

4. State action in matters of a local character can constitute no interference with the commercial power of Congress, for when that acts the state authority is superseded.

Transportation Co. vs. Parkersburg, supra.

5. Inaction upon such subjects of a local nature or operation, unlike its inaction upon matters affecting all the states and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by state authority.

Id.

6. There is no analogy between the imposition of taxes and the levying of tolls for improvement of highways; and any attempt to justify or condemn proceedings in the one case, by reference to those in the other, must be misleading.

Sands vs. *Manistee River Imp. Co., supra.*

7. Inspection laws must combine municipal with commercial regulations; and, while the power over the subject is yielded to the states, for obvious reasons, an absolute control is given over state legislation on the subject, as far as that legislation may be exercised, so as to affect the commerce of the country.

Gibbons vs. *Ogden, supra.*

8. The placing of a draw bridge across a navigable river is not an interference with commerce by the State of Ohio.

Palmer vs. Commissioners, supra.

It is the contention of the defendant-in-error that the construction of a boom in the Mississippi river at a point where that stream is annually used for the floatage of many million feet of logs cut from the forests of Minnesota, is a reasonable improvement in aid of commerce and that the exaction of tolls by its owner is not the imposition of a burden upon commerce. From this it naturally follows that reasonable fees exacted to compensate for public inspection, and not for revenue, is a valid exercise of the public powers and not in violation of the

commerce clause of the constitution. In this connection, it is not to be overlooked that all the fees collected go to the officer.

The right of inspection in such a case rests upon other grounds than those appearing in the line of authorities in which it was held that the state had exceeded its powers and upon which plaintiff-in-error seems to rely.

The Minnesota statute does not apply to rafts, nor even to logs driven by the boom down the river, but to loose logs gathered into booms which are then liable to be stolen. That there is a constant liability to confusion of logs is shown by the evidence. Sometimes there are logs scaled without marks (Record, 66); rafts break up and the logs float into the boom (Record, 66). Rafts were floated down the Mississippi from Stillwater (Record, 66). Logs sometimes escaped the boom at Minneapolis (Record, 76, 80), and at other points (Record, 81). Confusion of saw logs is a common experience (Record, 77, 82). One witness has "picked up" logs to the annual amount of 300,000 to 500,000 (Record, 84). One boat captain stated that the winds are very bad on Lake Pepin—a lake in the Mississippi river above the West Newton boom—and that he had seen rafts broken up there (Record, 86).

While we deem it immaterial, so far as the right of the state to provide for the inspection of logs running out of the boom at West Newton Slough is concerned, where the logs came from, the foregoing statement of the evidence is abundant warrant for the intervention of the state in the manner provided by the provisions of statutes above cited.

It remains to explain the decision relied on by the plaintiff-in-error.

Wabash, St. L. & P. Ry. Co. vs. *Illinois*, 118 U. S. 557, was a case in which the state sought to fix the rate of the railroad company as to interstate business.

Robins vs. *Shelby Co. Taxing Dist.*, 120 U. S. 489, was a case in which the State of Tennessee attempted to compel non-resident drummers to take out a license before they could

lawfully offer goods for sale in the various counties of the state. This was denied, while, at the same time, it is expressly stated that a state may pass "inspection laws to secure the due quality and measure of products and commodities" (p. 93).

Philadelphia & Southern Steamship Company vs. *Pennsylvania*, 122 U. S. 326, was a case where the State of Pennsylvania attempted to impose a tax upon the gross receipts derived from interstate business.

Fargo vs. *Michigan*, 121 U. S. 230, was also an attempt to tax gross receipts upon interstate business.

Railroad Company vs. *Husen*, 95 U. S. 465, was an attempt to prohibit the driving into the State of Missouri between the first day of March and the first day of November, of Texas, Mexican or Indian cattle, whether diseased or sound. It was simply prohibitive—a most oppressive interference with interstate commerce.

Bowman vs. *Chicago and Northwestern Ry. Co.*, 125 U. S. 465, was a case where the State of Iowa attempted to prohibit the importation into the state of intoxicating liquors.

Le Loup vs. *Port of Mobile*, 127 U. S., 640, was a case where the State of Alabama attempted to impose a license tax on interstate telegraphic communications.

Asher vs. *Texas*, 128 U. S., 129, is like *Robins* vs. *Shelby Taxing District*, which it affirms.

Stoutenburgh vs. *Hennick*, 129 U. S., 149. Same comment as last above.

Western Union Telegraph Co. vs. *Alabama State Board*, 132 U. S., 472. This case is essentially like *LeLoup* vs. *Port of Mobile*.

McCall vs. *California*, 136 U. S., 104, was an attempt by the board of supervisors of the city and county of San Francisco, to impose a license tax upon an agency of a line of railroad between Chicago and New York, established in San Francisco for the purpose of inducing passengers going from San Francisco to New York to take that line at Chicago, but not

engaged in selling tickets for the route, or, receiving or paying out money on account of it.

The Court cites *Pomeroy on Constitutional Law*, section 378, where referring to the signification of the word "commerce" the author says:

> "It includes the *fact of intercourse and of traffic* and the subject matter of intercourse and traffic. * * The subject matter of intercourse or traffic may be either things, goods, chattels, merchandise or persons. *All these may therefore be regulated.*"

Speaking of the agency, this Court say:

> "It was not incidentally or remotely connected with the business of the road, but was a direct method of increasing that business. The tax upon it, therefore, was, according to the principles established by the decisions of this court, a tax upon a means or an occupation of carrying on interstate commerce, pure and simple."

Norfolk & W. R. R. Co. vs. *Pennsylvania*, 136 U. S., 114, was a case in which the State of Pennsylvania attempted to impose a tax upon a railroad company, which was a link in a through line of road, for the privilege of keeping an office in the state.

Lyng vs. *Michigan*, 135 U. S. 161. This case merely followed *Leisey* vs. *Hardin*, 135 U. S. 100 in which it was held that the sale of intoxicating liquors by the agent of the importer, while such liquors were in their original package, could not be restrained by the state.

Cutcheon vs. *Kentucky*, 141 U. S. 47, involved a statute of Kentucky providing that the agent of an express company, not incorporated by the laws of that state, should not carry on business there without first obtaining a license from the state.

Brennan vs. *Titusville*, 153 U. S. 289. An ordinance of the

city of Titusville required agents soliciting orders on behalf of manufacturers of goods to take out a license and pay a tax therefor. The court cited most of the decisions relied on here by the plaintiff-in-error to the effect that such an ordinance sought to impose a tax upon commerce in violation of the constitution.

Pollock vs. *Farmers Loan and Trust Co.*, 157 U. S. 429, a case involving the power of Congress to impose direct taxes.

There is not one of the above cited cases which is not obviously distinguishable from the case at bar. For this reason, we deem any discussion wholly unwarranted.

It is insisted by the plaintiff-in-error that the doctrine announced in *Gibbons* vs. *Ogden*, 9 Wheaton, 1, is overruled by the following cases:

Wabash, etc., Ry. Co. vs. *Illinois, supra.*
Robins vs. *Shelby County, supra.*
Bowman vs. *Railway Co,, supra.*
Leisy vs. *Hardin, supra.*

We have already indicated, in brief words, the nature of these cases. No occasion arose in either of them to call in question the doctrine of *Gibbons* vs. *Ogden*. It is not, and cannot be claimed by the learned counsel that this Court has in any of those cases, by express words, overruled the doctrine of that case. We rely upon the belief that where it is overthrown it will be by clear and express language. If any principle has become strongly entrenched in the judicial thought of this country, it is the one which was then so clearly expressed by Chief Justice Marshall, and which has been followed with approval in numerous decisions of this Court.

But the contention is completely overthrown by the recent case of

Huntington vs. *Georgia*, 163 U. S. 308, where the Court say:

"In *Gibbons* vs. *Ogden*, 9 Wheat. 1, this Court rec-

> ognized the possession by each state of a general power of legislation, that 'embraces everything within the territory of a state not surrendered to the general government; all which can be most advantageously exercised by the states themselves.' Inspection laws, although having, as the Court said in that case, 'a remote and considerable influence or convenience,' are yet within the authority of the states to enact, because no direct general power on the objects of such laws was granted to congress."

The defendants-in-error respectfully submit that the State of Minnesota does not offend against the commerce clause of the federal constitution in providing for the inspection of logs in one of its chartered booms. It is nothing more or less than affording protection to its own citizens who are engaged in the business of floating logs.

Furthermore, it should not be overlooked that because in 1893 the greater part of the logs boomed were cut in Wisconsin, a different state of facts may have existed in any subsequent year. May the hands of the inspector be staved at any time when informed that Wisconsin logs are in the boom? Is it not his duty rather, a duty flowing from clear constitutional right, to inspect all logs running out of the boom, whether of domestic or other origin?

It is respectfully submitted that the judgment appealed from should be affirmed.

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